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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 BRIAN K. JOHNSON,

12 Plaintiff,

13 v.

14 ELDON VAIL, *et al.*,

15 Defendants.

Case No. C08-5654FDB

REPORT AND
RECOMMENDATION

Noted for January 20, 2009

16 This case has been referred to Magistrate Judge J. Kelley Arnold pursuant to 28 U.S.C. §
17 636(b)(1)(B) and Local MJR 4. This matter comes before the court on the plaintiff's motion for default
18 (Doc. 7). After reviewing the relevant pleadings and the remaining record, the undersigned submits the
19 following report and recommendation.

20 DISCUSSION

21 The Federal Rules of Civil Procedure require defendants to answer a complaint within twenty (20)
22 days from the date being served with the summons and complaint, or if service of the summons was
23 timely waived, within sixty (60) days after the date when the request for waiver was sent. Fed. R. Civ. P.
24 12(a). If a defendant fails to respond within that time, a default judgment may be entered. Benny v.
25 Pipes, 799 F.2d 489, 492 (9th Cir. 1986), *cert. denied*, 108 S.Ct. 198 (1987).

26 In this case, Plaintiff argues Defendants have not appeared or filed their answer to his Complaint
27 in a timely manner. Plaintiff seeks default and judgment. Plaintiff's argument is based on the fact that
28 an Answer has not been filed within the sixty (60) time period following the court's order directing

1 service, dated November 11, 2008.

2 In response to the motion for default, the attorney general for the State of Washington states a
3 limited appearance has been filed in the matter, but none of the defendants have yet to be served. In other
4 words, the U.S. Marshal did not send out the service forms soon after the court directed service. Upon
5 inquiry the court understands the U.S. Marshal sent out the service documents on January 14, 2009.
6 Accordingly, the court should expect the filing of The Notice of Lawsuit and a Return of Service from
7 each defendant in the near future. Subsequently, the Clerk should receive waivers of service of
8 summonses and an Answer or other appropriate affirmative pleading from defendants.

9 CONCLUSION

10 Because the time period to file an Answer or other affirmative pleading has not expired, the Court
11 should DENY plaintiff's motion for default without prejudice. Default judgments are generally
12 disfavored and the court prefers a decision on the merits, In re Hammer, 940 F.2d 524, 525 (9th Cir.
13 1991).

14 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the
15 parties shall have ten (10) days from service of this Report to file written objections. *See also*
16 Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those objections for purposes of
17 appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the
18 clerk is directed to set the matter for consideration on **February 20, 2009**, as noted in the caption.

19 Dated this 27th day of January, 2009.

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21 /s/ J. Kelley Arnold
22 J. Kelley Arnold
23 United States Magistrate Judge
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